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No. 84-106.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
PETITIONER,
v.
CLAUS VON BULOW,
RESPONDENT.

Opposition to Petition for Writ of Certiorari to the Supreme Court of Rhode Island.

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31 pp

Question presented.

Should this Court review a decision of a State Supreme Court reversing a conviction where the State Supreme Court based its decision ordering a new trial on "bona fide, separate, adequate and independent grounds" mandated by its own State Constitution and constituting "an alternative independent foundation upon which we rest our holding," after first concluding that trial errors resulted in a trial which failed "to promote the interests of society or defendant in reaching a fair or accurate resolution of the question of guilt or innocence?"

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CLAUS VON BULOW,
RESPONDENT.

Opposition to Petition for Writ of Certiorari to the Supreme Court of Rhode Island.

Statement of Case.

The petition for certiorari filed by the State of Rhode Island seriously misleads this Court. It proceeds for 21½ pages to discuss this case as if the sole ground for the decision below was the state court's interpretation of the Fourth Amendment to the United States Constitution. Then, when it finally gets around to acknowledging, at page 22, that the Rhode Island State Constitution *also* played a role in the decision below, it characterizes that role as nothing more than a superficial after-thought — as a mere "citation [to] the state constitution," which the state court "noted in addition" to federal authority.

Nothing could be further from the truth. As even a cursory reading of the decision below makes clear, the Rhode Island State Constitution provided a complete and full-fledged *alternative ground* upon which reversal was founded. Indeed, the Rhode Island Supreme Court introduced its discussion of the State Constitution by holding:

> Even were we to hold that defendant's Fourth Amendment rights had not been violated by the State Police's chemical testing, our own constitutional prohibition against unreasonable searches and seizures mandates that the evidence obtained through the state's toxicological examination of the contents of the black bag be suppressed.

(App. 47.)[1] The court below then launched into a careful exigesis of state law which consumed four printed pages (App. 47-51) and which explained in detail why Article 1, § 6 of the Rhode Island Constitution constitutes "'bona fide separate, adequate, and independent grounds,' . . . upon which [the court] base[d] [its] decision to suppress the admission of evidence procured by the state's toxicological analysis" (App. 47). And, as will be discussed *infra* at 8-12, in reaching this conclusion, the court below

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[1] Respondent uses the following abbreviations throughout: "Pet." for the State's Petition for Writ of Certiorari; "App." for the State's Appendix to Petition for Writ of Certiorari; "(Volume T. (page)" for citations to the record below. In addition, appellate briefs are referred to as "A.B." (Appellant's Brief); "S.B." (State's Brief). "A.R.B." (Appellant's Reply Brief); and "S.R.B." (State's Reply Brief).

engaged in precisely the type of analysis that properly insulates a state court decision from federal review.[2]

Thus, while the State of Rhode Island fails to even address the issue of an independent and adequate state ground until the very end of its petition — and then proceeds to address it misleadingly — the fact is that this issue is dispositive of the petition. For if, contrary to the state's suggestion, the Rhode Island Supreme Court did not merely pay lip service to Art. 1, § 6 of its state constitution but alternatively grounded its decision in that provision, then, complain as the state might, this Court simply has no "jurisdiction to review the federal constitutional errors complained of" (cf. Pet. 23).[3]

Before turning to the argument, a word must be said about the state's simplistic and one-sided rendition of the facts of this case. Since this petition does not raise sufficiency of the evidence issues, it is irresponsible of the state to present only the "facts" favorable to its side. The state studiously omits all reference to the massive amount of record evidence that points to Claus von Bulow's innocence. Since this is not a sufficiency case, respondent will not present its "closing argument" to this Court, as petitioner has. Suffice it to say that virtually every "fact" presented by the state has been challenged by contrary evidence, inferences and argument. This material is part of the voluminous record in this case — nearly 6,000 pages of transcript and 400 pages of briefs — and is available for this Court's perusal. Respondent

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[2] Petitioner also misleads the Court by never informing it that the Rhode Island Supreme Court found two separate issues "to be dispositive." (App. 11). See *infra* at 6-7.

[3] Lest there be any doubt, respondent will, after first demonstrating, in § I *infra*, why the judgment below is indeed supported by an adequate and independent state law basis, proceed to demonstrate, in § II *infra*, why even if the case had been decided exclusively on federal law grounds, the decision would present no issue worthy of certiorari — why it would be nothing more than an unremarkable application of well-established Fourth Amendment principles to the particular facts of this case, as found by the state court.

submits that a full reading of the record — including the material omitted by petitioner — supports Claus von Bulow's sincere assertion of complete innocence.[4]

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[4] A few examples should suffice to demonstrate the unfairness of the state's omissions.

The state omits all the evidence tending to prove Martha von Bulow caused her own comas: 1) that nineteen days before her second coma an admittedly self-administered aspirin overdose caused Martha von Bulow to be hospitalized for six days (25T. 3699; 18T. 2411; 8T. 419); 2) that even after being warned not to take aspirin, Martha von Bulow was found with aspirin in her system upon admission to Newport Hospital for her second coma (18T. 2426; 10T. 873); 3) that this behavior was consistent with her persistent refusal to abandon the habits which doctors informed her had resulted in past hospitalizations (18T. 2460, 2410; 20T. 3056, warnings to avoid sugar; 13T. 1359; 15T. 1784; 7T. 102, warnings to avoid alcohol; 18T. 2451-2452; 15T. 1756, 1784, warnings to avoid barbiturates and tranquilizers); 4) the testimony of Dr. Carr, a hospital psychiatrist, that Mrs. von Bulow told him that she was "almost never happy," "frequently bored," sometimes unwilling "to get up in the morning," and said, "I have often wished myself dead." (23T. 126-129); 5) the fact that regardless of who owned the black bag, every member of the household had access to the bag, and "ownership" of the black bag, even if established, did not resolve the question of access (9T. 639; 20T. 3060; 9T. 636-37; 3T. 462; 6T. 1051; A.B. 17-18; A.R.B. 5-7); 6) the fact that the sole item tying Claus von Bulow to the black bag may have, in fact, been mistakenly confused with a similar vial which would have established that Mrs. von Bulow owned the bag (25T. 3709-10; A.B. 12-16); 7) the fact that when Maria allegedly first discovered the Insulin in the black bag, her instantaneous, unrehearsed assumption was that it belonged to Martha von Bulow (9T. 651; 8T. 389); and 8) the fact that the only persons to have access to Martha von Bulow in the crucial period *before* she exhibited symptoms for both the first and second comas were herself and Alexander von Auersperg (6T. 1019-20, 1023-1026, 1072-75).

The state omits all the evidence tending to prove that Claus von Bulow made great efforts to help his wife: 1) that nineteen days before her second coma, Claus von Bulow rushed his wife to the hospital under circumstances indicating only a concern for her well-being (17T. 2393-2395; 25T. 3699); 2) on four out of five occasions on which Martha von Bulow was critically ill during 1979 and 1980, Claus von Bulow was the first to call the doctor (6T. 1094; 8T. 362; 9T. 615; 8T. 342); 3) Claus von Bulow's history of attempting to prevent Mrs. von Bulow's self-destructive tendencies from causing her injury (9T. 530-31; 485-86; 20T. 3061; 17T. 2380-81; 20T. 2922; 18T. 2398-99; 17T. 2382-85; 15T. 1754); and, 4) Claus von Bulow's sacrificing of his job for his wife's well-being (6T. 1018; 1044-45).

The state omits all the evidence which casts doubt on its medical testimony: 1) the conclusions of world leading experts who, when presented with all the

Nor can it fairly be said, as petitioner claims, that the Rhode Island Supreme Court has "confidence in von Bulow's guilt." (Pet. 2.) To the contrary, in resolving another issue in favor of

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information about Martha von Bulow's first coma, concluded that her condition was caused by a medical problem observable under clinical conditions (18T. 2456, 2495-97, 2501, 2505-06, 2534-35, 2536, 2544-45, 2553-54, 2532-33, 2567, 2409); 2) the fact that the state's medical experts were not properly presented with crucial medical information such as Mrs. von Bulow's alcohol and Inderal consumption (13T. 1359; 18T. 2595; 16T. 1930; 19T. 2722; 12T. 1184; 19T. 2720-23; 18T. 2593-96; 16T. 1930; A.B. 5-6); 3) contrary to the state's theory of injection, the absence of needle marks on Martha von Bulow's body — despite diligent attempts to find them (10T. 856; 11T. 926; 15T. 1769-70); 4) the presence of incrustations on the needle offered at trial indicating that it had never been injected (8T. 245; A.B. 11-12; A.R.B. n.30 at 12-13); 5) the state's concession on appeal that there is "no direct scientific evidence to prove that the needle was injected into Martha von Bulow" (S.B. at 15-16); 6) the fact that valium was found on the needle but not in Martha von Bulow's blood (12T.1176-1182, 17T. 2251); 7) the fact that the hypotheticals upon which the state's expert medical testimony was based were defective (19T. 2720-24, 2734; 19T. 2710-13; 18T. 2656; 10T. 1720-21; A.B. 3-6; A.R.B. 8-12; S.B. 6); and 8) that the high insulin level upon which they relied was only one of four discrepant values, and hence scientifically unreportable (18T. 2662; 25T. 3678-79; 20T. 3016; A.B. 6-8; A.R.B. n.25 at 10).

Finally, the state makes multiple assertions which are flatly contradicted by the record. Its petition is filled with innuendo and ominous "facts" which find no support either in the trial testimony of its own witnesses or in reality. 1) In the state's "scenerio" Mrs. von Bulow became ill only after Mr. von Bulow offered her soup (Pet. 5), whereas, in reality, Mrs. von Bulow began to display symptoms *before* Claus von Bulow offered to bring her the soup which she, in fact, asked him for (6T. 1075). 2) The state invents a "routine check" on Mrs. von Bulow which Mr. von Bulow precluded Maria from making (Pet. 5). However, the record is clear that Maria went to Mrs. von Bulow in the mornings upon Mrs. von Bulow's ringing for her (9T. 522-24). 3) The black bag was spotted in November 1980, not "among Claus von Bulow's things" (Pet. 4), but rather, in a white canvas tote bag used by both Mr. and Mrs. von Bulow containing magazines on a chair out in the open (8T.387, 390; 9T. 625). 4) Claus von Bulow did not "misrepresent" his wife's symptoms (Pet. 3), rather, he accurately described symptoms with which Maria disagreed (8T. 343, 344; A.R.B. 11, n.27). 5) Mr. von Bulow made no attempt to hide his description and conversation from Maria. Thus, she did not "overhear" him (Pet. 3), but rather he made the call openly in her presence (9T. 669). 6) Contrary to the state's claim, the cause of Martha von Bulow's 1979 episode did not "remain a mystery" (Pet. 4), but rather was fully and satisfactorily diagnosed both by the hospital doctors and at a subsequent work-up at Columbia Presbyterian Hospital (15T. 1731-1732; 18T. 2536). The final diagnosis of

respondent — an issue not even mentioned in the petition — the Rhode Island Supreme Court suggested that no "fair or accurate resolution of the question of guilt or innocence" could be made on the record of this case (App. 29). But, petitioner again misleads this Court by failing to inform it that the Rhode Island Supreme Court found *two* issues — not just the search and seizure issue — "to be dispositive" of the appeal.[5] The other issue — which

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"reactive hypoglycemia with sensitivity to alcohol" was arrived at based on all of the information about her first coma currently available to her doctors and it included a discussion with the patient herself concerning and confirming her alcohol intake prior to the first coma (*see*, A.R.B. 11, n.27). 7) The state's description of the search omits all references to a locksmith and to Richard Kuh (Pet. 6-7). At trial, the locksmith testified that the private investigator after searching the closet for the black bag, proclaimed that it was not there (20T. 3030-31). (For other examples of the state's attempt to downplay the role of Richard Kuh, see *supra* at 3, 6, 7. (*See* also App. 7-33). 8) The state nowhere mentions that on the occasion when Maria allegedly saw the bottle labelled "Insulin," a contemporaneous witness, Alexander von Auersperg, testified that he could not remember seeing Insulin, despite the fact that he stared at the bag for ten minutes (6T. 1055-1056). 9) The state makes the assertion that "[i]f Martha von Bulow were conscious no doubt she would speak volumes about the events of December 21, 1980" (Pet. 20). This assertion is bizarre in light of her silence for a year after what the state alleges was a similar attempt in 1979. Indeed, she remained married to Mr. von Bulow and never accused him of having anything to do with her condition. 10) The state mentions that Alexander "helped" his mother to bed on the night of December 20, 1980 (Pet. 5). In fact, Alexander had to *carry* her to bed at the completion of their conversation (6T. 1080). 11) As if it were a description of information available to the police at the time that they acted, petitioner states as fact that "von Bulow had secreted in a locked closet a suspicious black bag" (Pet. 14). In reality, all the police knew was that Alexander von Auersperg had produced a bag which might have belonged to Claus or Martha von Bulow or to neither (see A.B. 12-23; A.R.B. 6-7).

Respondent could add to this list, but it does not wish to unnecessarily burden this Court, and will merely state that the above list far from exhausts the numerous factual errors contained in the state's 28 page petition.

[5] "The Defendant raises several issues on appeal to this court. We find two of them to be dispositive. These are: (1) whether the trial justice erred in denying defendant access to certain materials in Kuh's possession and (2) whether the trial justice erred by failing to exclude the results of

the Rhode Island Supreme Court discussed first and which consumed 21 pages of its opinion — involved *the exclusion of potentially exculpatory evidence at the behest of the state*. (The state's complaint about "exclusionary" rules thus rings hollow, since it was the *state*, over *defendant's* vigorous objection, which successfully sought to exclude potentially exculpatory evidence.)

In that part of its decision, which the state does not seek to have reviewed, the Rhode Island Supreme Court found dispositive defendant's argument that the trial court's erroneous application of the lawyer-client and work-product privileges had the effect of denying defendant "access to the requested material [and] to block the flow of potentially relevant evidence that may have been vital to his defense" (App. 31). The result was an "injustice" to defendant and a failure "to promote the interests of society or defendant in reaching a fair or accurate resolution of the question of guilt or innocence" (App. 29).

In light of the Rhode Island Supreme Court's resolution of this dispositive issue, it is unfair — and untrue — to say that the Rhode Island Supreme Court had "confidence in von Bulow's guilt." (Pet. 2.) That Court said nothing of the kind, nor could it in light of the substantial evidence before it — both from the trial and the new trial motion — of Claus von Bulow's innocence. All the Rhode Island Supreme Court said was that without considering "the weight of the evidence nor witnesses' credibility," without considering the exculpatory evidence that was improperly excluded, and with the drawing of all reasonable inferences that are consistent with the accused's guilt (A. 51), it is possible to reach a reasonable conclusion that the defendant may have been guilty of count one. Even this conclusion was vigorously disputed by the Chief Justice, who concluded that "his conviction rests, not upon proof beyond a reasonable doubt, but upon speculation and conjecture (App. 58)."[6]

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tests performed by state officials upon the contents of the black bag without first obtaining a search warrant."

(App. 11). Defendant's other issues were substantial and might well have required reversal as well, had the court reached them. See Appellants' Briefs.

[6]The majority never discussed the sufficiency of the evidence on count two, the count in which the Chief Justice found that the piling of inferences was proper (App. 57).

Argument.

I. The Rhode Island Supreme Court Opinion Rested on Bona Fide Separate and Independent State Grounds.

A. *Introduction.*

Upon reaching, at the very end of its petition, the dispositive jurisdictional question that should have been presented first — whether the judgment of the Rhode Island Supreme Court is supported by an adequate and independent state-law basis — the state distorts the decision below and engages in a sophistic analysis to bolster its contention that this Court has jurisdiction to review what petitioner argues was an erroneous interpretation of federal constitutional law. Respondent submits that an examination of the Rhode Island Supreme Court's decision under the relevant criteria conclusively demonstrates that that decision rested squarely and solidly on an independent and adequate state ground which precludes review by this Court.

B. *The Existence of Independent, Adequate State Grounds to Support a State Court Judgment Bars Review of That Judgment by This Court.*

It is axiomatic that a state may afford its citizens greater protections under state constitutional provisions than this Court has determined must be provided under federal constitutional provisions. Indeed, "'[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitution.'" *Michigan* v. *Long*, 103 S.Ct. 3469, 3476 (1983) (quoting from *Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1940)). *See also*, *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975). As Justice Stevens noted in his concurrence in *Massachusetts* v. *Upton*, 104 S.Ct. 2085, 2091 (1984), "[t]he states in our federal system, however, remain the primary guardian of the liberty of the people."[7] Accordingly, under our system of federalism, it remains the task of state courts to define the scope of protections afforded to citizens under

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[7]Indeed, in *Upton* Justice Stevens emphasized that state courts should not "unnecessarily invite this Court to undertake review of state court judgments" *Upton*, *supra* at 2090.

state constitutional and statutory provisions. If a state court construes a state constitution to afford its state citizens greater protection than that afforded under the federal constitution, the state prosecutorial branch may not properly ask the United States Supreme Court to intrude into that domestic state dispute.

Consonant with these principles, this Court has long held that it cannot reach out to address federal questions raised in a state court decision where an independent and adequate basis for that decision is founded in the state court's interpretation and application of state constitutional and statutory provisions.[8] Reaching out in such circumstances results only in impermissible advisory opinions and denigrates the integrity of the state judiciaries. *See*, e.g., *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corporation* v. *Muller*, 296 U.S. 207 (1935).

C. *Under the Proper Standard of Review, This Court Must Recognize the Independent and Adequate State Ground in This Case.*

In its petition (Pet. 24), the state, quoting selectively from this Court's discussion in *Michigan* v. *Long* concerning the test to be applied in determining whether review of a state court judgment is permissible, contends that under that standard, review here is appropriate. However, examination of the substance of this Court's discussion in *Michigan* v. *Long* demonstrates that the opposite is true. There, this Court, re-emphasizing the independence of state courts and the avoidance of advisory opinions, reviewed the framework previously used for determining whether review of a state court decision is barred by independent adequate state grounds and enunciated the following standard to be applied:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence

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[8] In the context of addressing the availability of habeas corpus relief for state prisoners, this Court has forthrightly recognized that a state may insulate convictions from further review by applying its own rules. *See, e.g., Hankerson* v. *North Carolina*, 432 U.S. 233, 244 n.8 (1977); *Engle* v. *Isaac*, 456 U.S. 107, 134 n.43 (1982).

> of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion[*] that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Michigan v. *Long, supra,* at 3476.

Applying that standard to the facts before it in *Long*, this Court concluded that review was not barred. The Michigan Supreme Court had referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law. Both of the references to the state constitution were made in passing and were intertwined with the reference to the federal constitution. As described by this Court:

> On the first occasion, the court merely cited in a footnote both the state and federal constitutions . . . On the second occasion, at the conclusion of the opinion, the court stated: 'We hold, therefore, that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. I, § 11 of the Michigan Constitution.

Michigan v. *Long, supra,* at 3474 n.3

This Court further noted that the Michigan court had based its decision on its understanding of *Terry* v. *Ohio*, 392 U.S. 1 (1968) and other federal cases and had failed to cite a single state case

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[*] This reference to "judgment or opinion" is significant in light of petitioner's absurd attempt to distinguish between these two terms. *See* footnote 10, *infra*.

to support the holding that the search was unconstitutional. Thus, this Court concluded that:

> The references to the state constitution in no way indicate that the decision below rested on grounds in any way *independent* from the state court's interpretation of federal law. . . . [I]t fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law. . . . It appears to us that the state court 'felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.

Michigan v. *Long*, *supra* at 3477-3478 (citations omitted).

Examining the opinion of the Rhode Island Supreme Court in this case under the totality of the standard enunciated in *Michigan* v. *Long*, *supra*, unequivocally demonstrates the existence of an independent adequate state ground supporting the judgment of the court and precluding review by this Court.

Contrary to petitioner's suggestion (Pet. 22), this is not a case in which the lower court merely "cit[ed]" to or "noted" the existence of a state constitutional provision; it is not a case where this Court must guess at the meaning of a passing or cryptic reference to a state constitutional provision, statute or case in an opinion relying essentially on federal law. Compare, e.g., *Michigan* v. *Long*. Rather, the Rhode Island Supreme Court began a separate section of its opinion with the following pronouncement:

> Even were we to hold that defendant's Fourth Amendment rights had not been violated by the State Police's chemical testing, our own constitutional prohibition against unreasonable searches and seizures mandates that the evidence obtained through the state's toxicological examination of the contents of the black bag be suppressed. Article I, sec. 6, of the Rhode Island Constitution is an alternative, independent foundation upon which we rest our holding that the toxicological testing was an illegal search. That section constitutes "bona fide separate, adequate, and independent grounds," *Michigan* v. *Long*, ____ U.S. ____, 103 S.Ct. 3469, 3476, ____ L.E.2d ____ (1983), upon which we base

> our decision to suppress the admission of evidence procured by the state's toxicological analysis.

(App. 47).

The court then continued for four printed pages to analyze the Rhode Island Constitution and Rhode Island state case law as the basis for its conclusion that the Rhode Island Constitution separately and independently required suppression of the evidence. After explicating its power, as a matter of state law, to impose higher standards on searches and seizures than those required by the federal constitution, the Rhode Island Supreme Court set forth a number of instances where it had done so, explained its decision as consonant with Rhode Island's "early legislative enactment" of the exclusionary rule prior to federal application of the rule to the states, and applied the principles of its decision in *State* v. *Benoit*, 417 A.2d 895 (R.I. 1980), to the facts of this case. Thus, here — again, in sharp contrast to what occurred in *Michigan* v. *Long* — the state court did not reach its conclusion that its state constitution required suppression of critical evidence because it felt compelled to do so by prior federal decisions. Rather, it commenced its analysis with a clear and express statement that even if federal constitutional principles did not require suppression, the separate provisions of the Rhode Island Constitution mandated suppression. It then analyzed the facts under state precedent, and carefully and expressly stated that it was basing its decision on a separate and independent state ground. A state court can be no clearer than was the Rhode Island Supreme Court in this case.[10] To find that the Rhode Island Supreme Court failed in

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[10] Indeed, at one point in its petition, the state grudgingly — but candidly — concedes "that the *opinion* of the Rhode Island Supreme Court offered an alternative basis for the suppression of evidence in this case" (Pet. 24; emphasis in original). Realizing that this concession would deny this Court jurisdiction to review the case, it attempts to concoct a distinction between the *opinion* of the Rhode Island Supreme Court and its *judgment*. But in light of the reference in *Michigan* v. *Long* to "judgment or opinion," p. 10, *supra*, petitioner's attempt to distinguish between these two terms (see Pet. 24) is absurd. Moreover, the purported distinction ignores the fact that there is, under Rhode Island law, no separate document entitled "judgment." Indeed, as a matter of Rhode Island practice, "the judgment" is the concluding portion of "the opinion" — in this case, section V: "For the reasons stated, the defendant's appeal is sus-

this case to express sufficiently its reliance on grounds other than those it believed compelled by federal law, would mean that no state decision could be found to be based on independent and adequate state grounds. Such a result would violate the legitimate power of the State Supreme Court to decide, with finality, that its own state constitution mandates greater protection for its citizens than that required by the federal constitution.[11]

D. *The Alleged Failure of the Lower Court to Analyze Harmless Error in Its Discussion of State Law does Not Vitiate the Existence of Independent Adequate State Grounds.*

The state concedes that the Rhode Island Supreme Court engaged in a harmless error analysis. But it contends that that court did not specifically cite Rhode Island law nor expressly discuss harmless error in the context of its holding that the Rhode Island Constitution mandates exclusion of the challenged evidence. It

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tained, the judgment of conviction appealed from is vacated and the case is remanded to the Superior Court for a new trial on both counts." The absurdity of petitioner's argument is demonstrated by hypothesizing a case where a state court first considered *and rejected* a defendant's federal Fourth Amendment argument and then considered and *accepted* defendant's state constitutional argument and reversed with an order like the one in this case. Under the illogic of petitioner's argument, this Court would be precluded from relying on the state court opinion.

[11] Another mode of analysis demonstrating that certiorari is inappropriate here is suggested by *Herb* v. *Pitcairn*, 324 U.S. 117 (1945), another case cited by petitioner (Pet. 24). There, in remanding the case back to the state court for a determination of its ground for decision — a result which *Michigan* v. *Long* suggests is no longer favored — the Court stated:

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. *Pitcairn, supra* at 126. Here, in excising the Rhode Island Supreme Court's analysis of federal law and examining only its discussion of the state constitution and state law, it is plain that the same judgment would have resulted had the court below never mentioned federal law. Thus, even if the petitioner's analysis of federal law is correct — an analysis vigorously disputed by respondent, see § II *infra* — this Court's agreement with that position would, under the facts and circumstances of this case, be nothing more than an advisory opinion.

seeks to argue from this contention — which, as respondent will show, is simply erroneous — that despite its concession "that the opinion of the Rhode Island Supreme Court offered an alternative basis for the suppression of evidence" (Pet. 24), this Court nonetheless has jurisdiction to review this case. It argues that the Rhode Island Supreme Court's alleged failure separately to discuss state harmless error law demonstrates the inadequacy of the state law ground and the dependency of state law on federal law.

There are six dispositive reasons why petitioner's spurious arguments provide no plausible basis for review by this Court.

First, the state's assertion that "[t]he [lower] court neither analyzed nor concluded that the state constitutional error was harmful" (Pet. 26) is simply inaccurate.

Prior to embarking on both its federal Fourth Amendment and its state constitutional analysis of the "state expansion of private search" issue, the Rhode Island Supreme Court expressly addressed the prosecution's harmless error claims. It examined the admission of the challenged evidence *both* under the federal standard ("harmless beyond a reasonable doubt")[12] *and* under the Rhode Island standard ("a reasonable possibility that defendant would be convicted").[13] It found first that "even cursory review of the record precludes . . . a finding, [that the error was harmless beyond a reasonable doubt]". It pointed to the absence of any "direct evidence to connect defendant with the two alleged murder attempts upon his wife," noting that the "State's entire case is predicated upon circumstantial evidence"[14] (App. 35). It then concluded that "at a minimum," the introduction of the evidence at issue "created a reasonable possibility that defendant would be convicted." (App. 37).

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[12] See *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967).

[13] See *State* v. *Burke*, 427 A.2d 1302, 1304 (R.I. 1981); *State* v. *Bowden*, 473 A.2d 275, 280 (R.I. 1984); *State* v. *Benoit*, 417 A.2d 895, 901 (R.I. 1980). The exact language used in *Benoit* is "reasonably possible that such evidence would influence an average jury on the ultimate issue of guilt or innocence." *Id.* at 901.

[14] A state is, of course, entitled to take a more skeptical view of cases based entirely on circumstantial inferences than do the federal courts. Rhode Island does, in fact, have a far more demanding test for convictions based on multiple circumstantial inferences. See *In re Derek*, 448 A.2d 765 (R.I. 1982). A state may also take this skeptical view of cases based on multiple inferences into account in applying its harmless error rule.

Having fully responded to the harmless error claims made by the prosecution, the Rhode Island Supreme Court then turned to its Fourth Amendment analysis and then to its state constitutional analysis which petitioner concedes was "an alternative basis for the suppression of evidence in this case." (Pet. at 24.)

How petitioner can now argue that "the court never concluded that the state constitution required reversal of von Bulow's conviction" (Pet. 25-26) defies understanding. Its criticism, at best, is of the formal structure of the court's opinion. It would have preferred the Rhode Island Supreme Court to have separately addressed the federal and state harmless error rule in different parts of its opinion. This is especially mystifying in light of petitioner's contention that this Court "is empowered to review judgments, not opinions." The state prosecution is surely not empowered to ask this Court to reorganize the paragraphs of a state court opinion in accordance with the prosecutor's preferences.

Second, the harmless error issue raised by petitioner does not involve resolution of a question of law, state *or* federal. It involves a practical evaluation of the evidence in a particular case — a factual weighing of the impact of particular error on the jury — which, contrary to petitioner's contention, does *not* involve determination of constitutional issues, under either Rhode Island law[15] or federal law.[16]

Third, it is clear that a state court's determination of whether, how and when a particular state standard of review need be applied is a question of state law that is insulated from review by this Court. See pp. 9-10. Whether a state court correctly or

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[15] As the Rhode Island Supreme Court stated in *State* v. *Benoit*, 417 A.2d 895, 901 (R.I. 1980), in making its determination of harmless error the court will "examine the 'record with a view to determining what in our judgment would have been the probable impact of the improper evidence on the minds of the jury.'" (Quoting from *State* v. *Bower*, 109 R.I. 198 (1971).)

[16] As Justice Harlan noted in his dissent to *Fahy* v. *Connecticut*, 375 U.S. 85, 92 (1963), harmless error determinations are "evidentiary questions" which "are not a proper part of this Court's business." Disputes regarding harmless error require review of the record, and "[t]he most that can be said is that the record leaves the issue of harmless error open to differing conclusions. That, however, furnishes no ground for this Court's intervention. . ." *Id.* at 92.

completely applies its own law surely raises no issue of federal law.[17] See *Connecticut* v. *Johnson*, 103 S.Ct. 969 (1983); *Barclay* v. *Florida*, 103 S.Ct. 3418 (1983).

Fourth, petitioner takes the position that the Rhode Island harmless error rule is not the same as the federal rule and is not derived from it: "[I]n analyzing state constitutional issues, the Rhode Island Court eschews the *Chapman* 'beyond reasonable doubt' standard in favor of a more relaxed standard" (Pet. 26).[18] Yet if

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[17] Indeed, there is no authority for the proposition that a state must — as a matter of federal constitutional law — have *any* harmless error rule. A state is entirely free — if it chose to — to have a rule of automatic reversal if certain state constitutional provisions are violated. *Connecticut* v. *Johnson*, *supra*, at 974 n.9. Justice Stevens, concurring in *Connecticut* v. *Johnson*, 103 S.Ct. 969, 978 (1983) noted the important differences between three kinds of harmless error rules: 1) when federal constitutional error has been committed; 2) when federal nonconstitutional error has been committed; and 3) "a state's own harmless error rule applicable to errors of state law." Justice Stevens then commented that *Connecticut's* claim that a state Supreme Court "must make a harmless error examination everytime the prosecutor asks it to" is "so clearly erroneous that it does not merit the court's review by writ of certiorari." *Id.* at notes 2 and 3. That case involved the giving of a *Sandstrom* instruction — an issue based on federal constitutional law. In this case, involving a violation of the state constitution, it follows *a fortiori* that the prosecutor's claim concerning a state harmless error examination does not warrant Supreme Court review.

It should also be noted in this context that it is not unusual in Rhode Island practice, when the court makes findings that significant evidence was improperly admitted, to proceed to order reversal without engaging in *any* explicit harmless error analysis at all. In *State* v. *Sitko*, 460 A.2d 1 (R.I. 1983) for instance, the court found that "much of the evidence presented against the defendant" resulted from a search based on an improper state wiretap. In granting the defendant's motion to suppress, the court simply declared the judgment vacated and the case remanded, without making any findings as to harm or prejudice. *Id.* at 6. See also, *State* v. *Luther*, 116 R.I. 28 (1976).

Similarly, in this case, where the lower court found that the disputed evidence "formed a significant part of the state's case" (A. 35), the court was free, under Rhode Island practice, to order reversal without a separate discussion of harm. For this reason alone, the omission of a state law harmless error discussion — or indeed, any harmless error discussion — can raise no question within this Court's jurisdiction.

Here, of course, there can be no question that the lower court's harmless error analysis was indeed a sufficient one.

[18] It is not clear what petitioner means by "more relaxed." As discussed above, in its opinion in the instant case, the Rhode Island Supreme Court first found that the evidence was not harmless under the *Chapman* standard: it then

it is true that the state eschews the federal constitutional standard in evaluating state constitutional errors (as the petitioner contends) and if the result is favorable to the defendant (as is the case here) then it is beyond dispute that the "application of a state harmless rule is, of course, a state question where it involves only [alleged] errors of state procedure or state law." *Chapman* v. *California*, 386 U.S. 18, 21 (1967). And the State Supreme Court is the highest authority on such state questions.[19]

Fifth, even if the state harmless error rule is substantially similar to the federal rule — which petitioner disputes — it simply does not follow that the state analysis is dependent on federal law. See *Michigan* v. *Long*, *supra* at 103 S.Ct. 3476. Each may be — and indeed is — independent of the other. Indeed, the state of Rhode Island began to evolve its own independent harmless error standard even before the Supreme Court decided on the

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went on to find that "*at a minimum*," it created a reasonable possibility that defendant would be convicted." (App. 37.) -- quoting the *Burke* standard (see p. 14, n.13 *supra*).

[19] Nor does it matter whether the state standard is more favorable to the prosecution, more favorable to the accused, or substantially similar. In any case, it is purely a question of state law.

If the state standard is more favorable to the prosecution, then any alleged failure of the state court to apply that standard does not raise a federal constitutional issue. Petitioner's remedy, if any, was before the State Supreme Court. As discussed *infra*, it should have — but did not — make this afterthought argument in its petition for reargument. If the state standard is more favorable to the defendant, then the state surely has no standing to complain to the court. For if the state court found harmless error under a standard more favorable to the state, it would necessarily find harmless error under a standard more favorable to the defendant. If the Rhode Island standard is substantially similar to the federal standard — which petitioner disputes — then there would be no reason for the Rhode Island Supreme Court to make separate harmless error evaluations under each standard. Moreover, as previously argued, this Court would then be presented with no broad issue involving the proper standard to be applied. Instead the issue would simply be whether under the particular facts of the case an admittedly proper state standard has been correctly applied. This is surely a mundane and particular issue of state law application, not properly subject to review by this Court.

Nor should this Court seek to resolve the issue raised by the state: namely whether the current Rhode Island standard is "more relaxed," less relaxed, or substantially similar to the *Chapman* standard. The extent, if any, to which that issue may be in flux within the Rhode Island judiciary is simply not a federal concern. The courts of Rhode Island are fully capable of resolving it, if indeed, it requires any resolution.

proper federal standard for federal constitutional errors. *See Senn* v. *Kogut*, 89 A.D.2d 842, 844-845 (R.I. 1952) (detailing Rhode Island's long statutory and common law harmless error doctrine); *Marley* v. *Providence Journal Company*, 134 A.2d 180, 184 (R.I. 1957); *Cummings* v. *Church*, 50 R.I. 71 (R.I. 1929).

Sixth, petitioner waived the argument it is now seeking to have this Court review by bypassing the state remedy available to correct the alleged error of state law of which it now complains. It never asked the Rhode Island Supreme Court to make an entirely separate examination of harmless error under the Rhode Island cases. In its initial appellate brief, it never argued that there was any distinction between the state and federal harmless error standards. Its reply brief was also silent on this issue. And in its lengthy petition for reargument — filed *after* the decision which it is now seeking to have this Court review — it never once suggested that the Rhode Island Supreme Court should separately examine the admission of the challenged evidence under the federal and state harmless error rules. By thus bypassing the appropriate state vehicle for raising this issue, petitioner waived its current argument under Rhode Island law and practice. *See*, R.I. Sup. Ct. R. 16(a).

The petitioner's current argument is a classic post-appellate afterthought of this sort which this Court has repeatedly refused to consider. See *Barclay* v. *Florida*, 103 S.Ct. 3418, 3425 n.9.

Thus, there is neither any gap nor inadequacy in the Rhode Island Supreme Court's applications of the harmless error standard. That Court found the admission of the challenged evidence to be constitutional error under Article I, § 6, of the Rhode Island Constitution after fully considering and rejecting the prosecution's harmless error arguments. It applied its own harmless error rule in a manner consistent with Rhode Island state law and practice. Petitioner had every opportunity to challenge any alleged failure of the Rhode Island Supreme Court to be more specific in its petition for reargument, but petitioner failed to do so. That should be the end of the matter.

II. The Federal Law Analysis Below Is an Unremarkable Application of Well-Established Fourth Amendment Principles to the Particular Facts of This Case.

Even if this Court could properly reach petitioner's federal law claim — which it cannot — this Court would find no valid basis for granting *certiorari* in this case. For although the state *asserts* that the court below "decided important matters of federal law in a manner contrary to cases decided by this Court, and in conflict with the decisions of the highest courts of other states and decisions of federal courts of appeals" (Pet. 2, see also Pet. 12), the fact is that the court below did no such thing. Indeed, an examination of the decision of the Rhode Island Supreme Court reveals that it made *no* decisions contrary to the decisions of this Court; it expounded no new standards to govern the application of federal law; rather, in the alternative part of the decision based on federal law it took the standards and principles of federal law that it found in decisions of this Court and properly applied those standards and principles to the facts of this case.

A. *The State's Only Quarrel with the Lower Court's Resolution of the Fourth Amendment Claims Is a Quarrel With Its Fact Findings, Not with Its Interpretation of the Law.*

The central thrust of petitioner's Fourth Amendment argument is a claim that the Rhode Island Supreme Court incorrectly interpreted this Court's decision in *United States* v. *Jacobsen*, 104 S.Ct. 1652 (1984). Indeed, petitioner accuses the Rhode Island Supreme Court of "eschew[ing] *Jacobsen's* principles in favor of von Bulow's original expectation of privacy in his locked closet" (Pet. 12), of "zeal[ously] . . . avoid[ing] the mandate of *Jacobsen*" (*id.*), and, ultimately, of "rejecting *Jacobsen*" (Pet. 13). Specifically, petitioner argues that whereas *Jacobsen* "held that in measuring the reasonableness of police conduct, a court must view the facts as they existed at the time an official invasion occurred" (Pet. 10), "the Rhode Island Supreme Court ignored the objective reasonableness of the [state toxicological] test[ing] at its inception." (Pet. 13).

Petitioner's argument completely overlooks the fact that the Rhode Island Supreme Court explicitly *discussed, accepted* and *applied* the principles and mandate of *Jacobsen* (see App. 38-43,

46, 47) — going so far as to acknowledge that in light of *Jacobsen* its own earlier decision in *State* v. *Eiseman*, 461 A.2d 369 (R.I. 1983) "would have been quite different" (App. 39).[20] The problem with petitioner's argument is, even more fundamentally, that it is based on a characterization of the *facts* "at the inception" of the official invasion that is *wholly at odds* with the facts as found by the Rhode Island Supreme Court.

Thus, in petitioner's version of the facts, "[b]efore Sgt. Reise ordered any state toxicological test, each and every item related to the black bag had already been identified . . . [and] [m]oreover, Reise knew that in the form they were possessed, some of the items sent for testing were contraband . . ." (Pet. 8-9, see Pet. 10-11, 14). But in the facts *as found by the Rhode Island Supreme Court* — found after consideration of essentially the same factual argument presented now by the state,[21] and after the court's own "full reading of [Sgt. Reise's] testimony" (see App. at 44) — there was *no* certainty of identification prior to the toxicological tests and Reise harbored only a vague, subjective suspicion that the items were "contraband". The decision reads in relevant part:

> Despite his expertise, Lieutenant Reise was unable to identify with a reasonable degree of certainty those substances that he had received from Alex without further test-

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[20] Petitioner's suggestion that because *Jacobsen* was decided after the oral argument in this case, the court below "was without the benefit" of "the careful discussion" of that decision that "normally occurs in appellate briefs and arguments" (Pet. 12 n.7) is disingenuous. When *Jacobsen* was decided, both parties submitted letters exclusively devoted to discussing that decision, and these letters, far from being "cursory" (*Id.*), provided the court below with unusually extensive discussion of the principles of *Jacobsen* and of the bearing of those principles on this case. Indeed, the text of the parties' *Jacobsen* letters consumed *fourteen printed pages* (eight by petitioner, six by respondent) — more than half the length of the state's petition for *certiorari* now before this Court.

[21] With one difference discussed *infra* at notes 25 and 26, the state previously argued for the same fact findings of "virtual certainty of identification" and of a "reasonable belief in contraband" in its briefs on appeal, in its oral argument and in its *Jacobsen* letter — as a review of the latter, replete with its citations to the state's brief, confirms. *See*, e.g. App. 81-82, ¶ 4, citing state's brief at 80; (App. 82, ¶ 5; App. 83, ¶ 7, citing State's brief at 77-79; App. 85, citing state's brief at 80).

> ing. His testimony is replete with admissions that he sent samples to the state lab because he simply did not know what they were. In spontaneous response to two questions posed by the prosecutor upon direct examination, Lieutenant Reise gave virtually identical answers to explain why he ordered the testing: "I had no idea what it was" (papaveretum); I sent it "[f]or the same reason I just didn't know what it was" (lidocaine). And on subsequent cross-examination, Lieutenant Reise reaffirmed the fact that he ordered the chemical analysis of certain substances precisely because he lacked knowledge of their identity. He stated that the reason he had had the state lab perform the testing was because there were "some unknowns in there that I couldn't identify just through a Physicians Desk Reference." Although he did testify that he felt certain substances delivered by Alex were "a contraband substance or something of that nature," a full reading of his testimony convinces us that these statements were nothing more than an expression of his own vague, subjective suspicions about their identity. These statements clearly do not support a finding that Lieutenant Reise was able to identify the substances delivered by Alex with any reasonable degree of certainty without the aid of the state toxicological tests.

(App. 44.)

Under these facts, it is clear that the Rhode Island Supreme Court did not "ignore[ ] the objective reasonableness of the [state toxicological] test[ing] at its inception," as the state argues (see Pet. 13); on the contrary, the Rhode Island Supreme Court focussed on precisely that question.[22]

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[22] Nor is petitioner correct in suggesting that in conducting its Fourth Amendment analysis the Rhode Island Supreme Court "fastened upon the subjective test results that showed that one red capsule's chemical identification did not conform to Sgt. Reise's plain view identification" (Pet. 13). To be sure, the Rhode Island Supreme Court did "fasten upon" the results of that test in its discussion of why the error could not be deemed harmless. See App. 34-37 and discussion *supra*. However, in applying the principles of *Jacobsen*, the Rhode Island Supreme Court made only one passing reference to the fact that one of the pills "could not have been purchased with a doctor's prescription in a pharmacy in the condition in which it was found" (App. 42), and that refer-

Having met with defeat on its factual argument in the decision below and on rehearing,[23] the state seeks another bite at the apple[24] in this Court — a chance to persuade this higher court that its own state supreme court "*misperceived the facts . . .*" of this case. (See Pet. 13-14; emphasis added). In short, the state's quarrel is not with the law as interpreted by the Rhode Island Supreme Court; it is with the facts as found by that court. And obviously *certiorari* does not lie to resolve such a quarrel.[25]

B. *The State Presents No Reason To Eliminate the Exclusionary Rule in This Case.*

Petitioner attempts to bolster its case for *certiorari* by arguing that "the principles endorsed" in this Court's recent decisions in

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ence was made in the context of emphasizing that, at the inception, "*most*, if not all, of the substances tested . . . were found in standard medicine bottles and vials . . . [and] not . . . in such a condition . . . as would make it a virtual certainty 'that [they] contained nothing but contraband.'" (App. 42, citing *Jacobsen* at 4417; emphasis added).

[23] In its Petition to Reargue, the state again tried to persuade the Rhode Island Supreme Court that the evidence "show[ed] that [Sgt. Reise] was virtually certain of the contents of the pill capsules, ampules and tablet before they were verified by the toxicology lab" (App. 59, see also App. 63) and that he reasonably belie[ved] that the items sent for testing were contraband" (App. 61). The state also cited in its Petition to Reargue to R.I. G.L., §§ 21-28, 3.29 for support of its "contraband" claim (compare App. 61 with Pet. 9). But after "carefully consider[ing]" all of the state's arguments, see Order on Petition to Reargue (App. 68), the Rhode Island Supreme Court was not persuaded. (Contrary to the state's suggestion, (Pet. 14 n.8), the fact that the Rhode Island Supreme Court did correct a specific factual error in its Order on the Petition to Reargue does not weaken, but rather strengthens, the state court's assurance that it "carefully considered" all of the state's arguments (App. 68).)

[24] The one change in the factual argument the state presents to this Court is that now, rather than argue that Reise himself "was virtually certain of the contents. . ." the state argues merely that the contents "had *already been* identified — not that Reise *knew* of their previous identification. (See Pet. 8-9, 10-11, 14).

[25] The inappropriateness of *certiorari* in this case is even more dramatic when the one change in the factual argument the state now presents to this Court is taken into account. For under the state's current version of the facts, the searching officer, Reise, *did not know* the results of any previous identifications (see Pet. 8-9, 10-11, 14) — in contrast to the situation in *Jacobsen*, upon which the state seeks to rely, where the searching officer was not similarly lacking in knowledge. See *Jacobsen*, *supra*, at 1659, 1660, 1661.

Massachusetts v. *Sheppard*, No. 82-963 (U.S. July 5, 1984) and *United States* v. *Leon*, No. 82-1771 (July 5, 1984) "suggest that the application of the exclusionary rule in this case is inappropriate" (Pet. 15). But the state cannot ride coattails on *Sheppard* and *Leon*, for those cases involved searches conducted *pursuant to warrants* where the officer's good faith was found by the lower court.[26] As the court in *Leon* emphasized

> The good-faith exception for searches conducted pursuant to warrants is *not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment*, and we do not believe that it will have this effect.

(Emphasis added.)[27]

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[26] Indeed, the Rhode Island Supreme Court made findings of fact incompatible with the kind of good faith found in *Leon*.

[27] Nor does the state's prediction (see Pet. 18-19) that a retrial could result in a re-conviction provide a reason to eliminate the exclusionary rule in this case. For just as the existence of a Fourth Amendment violation cannot be "dependent upon the results" of the search (see Pet. 13), so too the application of the exclusionary remedy cannot depend upon the outcome at a new trial. In any event, the state can only speculate as to what would occur at a retrial in this case — and the speculation it advances (Pet. 18-19) fails to take into account respondent's substantial new trial motion presently pending before the state courts. Since petitioner has engaged in the prediction that the "evidence regarding an insulin encrusted needle will therefore reach the jury at a second trial" (Pet. 18), it is incumbent upon respondent to correct that misstatement. In its appellate brief, petitioner conceded that the alleged "murder weapon" was "never tied into Mrs. von Bulow" and that there is "no direct scientific evidence to prove that this needle was injected into Martha von Bulow" (S.B. at 15-16). In his new trial motion, respondent offers evidence that this needle — the alleged "murder weapon" — could not have been injected into Martha von Bulow. There is grave doubt therefore, whether the needle "will . . . reach the jury at a second trial." There is also grave doubt whether a jury, hearing the evidence that was erroneously excluded as well as the new evidence of innocence, will again convict. Nor is it appropriate for petitioner to speculate as to the contents of Mr. von Bulow's testimony at a new trial (Pet. 19). In light of the new evidentiary developments since the first trial, it is as impossible as it is irrelevant for the state to speculate accurately as to the evidence or result of any new trial.

Conclusion.

The Rhode Island Supreme Court's decision according Claus von Bulow a new trial at which an "accurate resolution of the question of guilt or innocence will be possible", was based on independent state grounds, was correct as a matter of fact and law, and should be deemed final under principles of federalism, constitutional restraint, and fairness. Accordingly, respondent respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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For the convenience of the Court, all of the briefs below as well as the new trial motion and supporting affidavits have been sent to the Clerk's Office. See e.g. Supplemental Memorandum of the United States in *Rosner* v. *United States*, Supreme Court 73-1062.

The significance of the newly discovered evidence is vividly demonstrated by a chart appended to the new trial motion, which juxtaposes the new evidence with the state's claims at trial.